Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-725

HERBERT W. ARMSTRONG AND GARNER TED ARMSTRONG,
Petitioners,

vs.

MARGARET E. AIKEN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MARGARET E. AIKEN, respondent, respectfully submits the following brief in opposition to the petition for certiorari to the Supreme Court for the State of Alaska filed on November 23, 1976.

QUESTIONS PRESENTED

The questions presented for review by petitioners would be more accurately phrased as follows:

(1) When a complaint fails to allege facts that certain defendants had any contact with the State of Alaska, and those defendants submit affidavits stating they have no minimum contact, and the plaintiff has not had an opportunity to engage in discovery to refute such affidavits, has the Alaska court, by denying without prejudice a motion

to quash service of summons, applied the Alaska long arm statute in violation of the Fourteenth Amendment to the United States Constitution and the decisions of this court construing the same?

(2) Does the plaintiff have a burden, under the due process clause of the Fourteenth Amendment to the United States Constitution, of alleging in the complaint jurisdictional facts for *in personam* jurisdiction under a state long arm statute?

(3) Does the due process clause of the Fourteenth Amendment to the United States Constitution prevent the plaintiff from engaging in discovery procedures with the defendant-petitioners prior to proving the requisite facts for *in personam* jurisdiction?

STATEMENT OF THE CASE

Petitioners' statement of the case contains the following inaccuracies and omissions:

(1) Petitioners state that the respondent served petitioners with a summons and complaint after withdrawal of their notice of appearance. In fact, the respondent served petitioners with notices to absent defendant and complaints prior to such withdrawal.

(2) Petitioners state that the trial court denied their motion without stating any reason. While it is true the judge did not state a reason in his order, he did state from the bench his reason for denying the motion, to-wit: this is a matter of law which arises from matters of fact and should be safeguarded until trial where the facts can be brought out under oath (Appendix "A" page 2a). He then reserved decision on the motion and later denied it without prejudice.

REASON FOR DENYING WRIT

The decision of the Alaska Supreme Court is not final because the decision of the Superior Court was rendered without prejudice, the judge stating from the bench that the motion to quash service of summons should properly be safeguarded until a time when the facts can be brought out under oath (Appendix "A" pages 2a-3a). The effect of the decision of the Superior Court and the denial of the petition for review by the Alaska Supreme Court is nothing more than to allow the respondent to engage in a discovery program with the petitioners in order to determine facts heretofore available only to the petitioners which are relevant to the issue of *in personam* jurisdiction.

ARGUMENT

The decision of the Alaska Supreme Court is not a "final judgment" which would be a proper subject for review by this Court. It was not an effective determination of the litigation and no rights were adjudicated, the trial court stating words to the effect that it could not properly decide the issue of *in personam* jurisdiction on its merits without evidence given under oath, and then denying the motion without prejudice. It does not meet the test of finality set forth in the following decisions of this Court: *Department of Banking, State of Nebraska* v. *Pink*, 317 U.S. 264, 268, 87 L.Ed. 254, 63 S.Ct. 233, 235; *Market Street Railway Co.* v. *Railroad Commission*, 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770, 773; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 91 L.Ed. 80, 67 S.Ct. 156.

The cases cited by the petitioners as authority for the position that the decision of the Alaska Supreme Court is a "final judgment" are distinguishable from the present case in two crucial respects.

The Court, in discussing the circumstances under which the state court's decision is considered a "final judgment" and properly reviewable, stated in *Rosenblatt* v. *American Cyanamid Company*, 15 L.Ed.2d 29, 42, 43, 86 S.Ct. 1, 3:

> Here, as in Curry [*Local No. 438* v. *Curry*, 371 U.S. 542, 9 L.Ed.2d 514, 83 S.Ct. 531] there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts; (2) a threat of serious erosion of national policy (here the due process right against subjection to excessive state assertions of *in personam* jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case.

In the case at bar, there has been no final assertion of jurisdiction. The petitioners may raise the issue again after the jurisdictional facts are established through discovery. The issue of *in personam* jurisdiction was raised prematurely by the petitioners in the Superior Court, as there was not a sufficient basis upon which that Court could make the necessary factual determinations to decide this issue on its merits.

In addition, the issue of *in personam* jurisdiction is "enmeshed in the factual controversies" of the case at bar. Many of the questions that the respondent will seek to answer through discovery concerning jurisdiction are the same questions which bear upon the petitioners' liability for alienation of the affections of the respondent's husband. Examples of these questions are who has control over the distribution to Alaska of the petitioners' radio and television programs, and who authored and authorized certain pieces of literature which discuss the teachings of the Worldwide Church of God regarding "scriptural divorce".

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the petition for a writ of certiorari to the Supreme Court of the State of Alaska be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 75-3410

MARGARET AIKEN,
Plaintiff,
vs.
WORLD WIDE CHURCH OF GOD, et al,
Defendants.

VOLUME I

TRANSCRIPT OF HEARING ON DEFENDANT ARMSTRONG'S MOTION TO QUASH SERVICE OF SUMMONS (TAKEN UNDER ADVISEMENT) (EXCERPT)

BEFORE THE HONORABLE PETER J. KALAMARIDES
Superior Court Judge
Anchorage, Alaska
August 4, 1976
9:00 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF:

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Anchorage, Alaska

FOR THE DEFENDANTS:

Donald A. Burr
Attorney at Law
825 West Eighth Avenue
Anchorage, Alaska

B-1037

1783

PROCEEDINGS

1783

(This portion not requested)

1924

THE COURT: All right. Now, I want to hear the argument as to jurisdiction on matters of law. Because the matters of law which arise out of the matters of fact are ordinarily safeguarded until trial. Because at that time we have the facts drawn out under oath.

1927

(This portion not requested)

1998

THE COURT: At first glance it would appear that these—this matter is a matter of law arising out of a matter of fact, but I'm not going to make that determination at

this time. I'm going to reserve decision in this matter for a few days, I'm going to review and look back again what the concept that was brought up at this particular oral argument. I want to thank you gentlemen for your assistance. I'll let you know just as quickly as possible. If there's nothing further, we'll stand in recess.

THE CLERK: Please rise. Court stands at recess.

(Court recessed)

2000

END OF REQUESTED PORTION

CERTIFICATE

SUPERIOR COURT)
) ss.
STATE OF ALASKA)

I, Roma L. Akulaw, court reporter for the third judicial district, state of Alaska, hereby certify:

That the foregoing pages numbered 1 through 2 contain a full, true and correct transcript of proceedings in cause no. 75-3410, Margaret Aiken versus World Wide Church of God, et al, third district, transcribed by me to the best of my knowledge and ability from third judicial district Akai recorder tape identified as follows:

Tape No. B-1037 Log Nos. 1924-1927
Log Nos. 1998-2000

DATED at Anchorage, Alaska, this 9th day of December, 1976.

Signed and Certified to by:

/s/ Roma L. Akulaw
Roma L. Akulaw
Court Reporter

(Seal)